DATE: JULY 17, 1997
CASE NO. 95-INA-407

In the Matter of:

NIPPON TRAVEL, LTD.
Employer

On Behalf of:

SHIMA HONMA (a/k/a HOMMA)
Alien

APPEARANCE: Jerry C. Chang, Esq.
For the Employer

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of Unite States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and

the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On February 16, 1994, the Employer, Nippon Travel, Ltd., filed an application for labor certification to enable the Alien, Shima Honma (a/k/a Homma), to fill the position of Management Trainee. The job duties for the position, as stated on the application, are as follows:

> Receive training and perform duties in office management, customer relations, accounting & sales to become familiar with staff functions & operations. Observe and practice methods, procedures & standards required for performance of duties.

(AF 46).

The stated job requirements for the position, as initially stated on the application, are as follows: 2 years of college education with the Major Field of Study in "Accounting/General Study;" 1 year of experience in the "Related Occupation" of sales/customer relations and dealing with Japanese customers; Japanese word processing application; and, Japanese language ability (AF 46).

In a Notice of Findings ("NOF") issued on December 9, 1994, the CO proposed to deny certification on the grounds that each and every one of the above-listed requirements is unduly restrictive, in violation of §656.21(b)(2). Furthermore, the CO found that the wage offer of $17,900 per year is below the prevailing wage of $28,500 per year.

The Employer submitted its rebuttal on or about December 26, 1994 (AF 19-31). As set forth in the Final Determination, dated February 23, 1995, the CO found that the Employer had successfully demonstrated the need to have experience in handling customer relations with Japanese clients, experience in Japanese word processing, and the Japanese language requirement. In addition, the CO accepted the Employer's prevailing wage survey. Accordingly, the sole basis upon which the CO proposed to deny certification was Employer's requirement of 1 year of college education (AF 15-18) .

On or about March 21, 1995, the Employer filed a request for reconsideration and, alternatively, a request for review of the denial of certification (AF 2-14). By letter dated May 11, 1995, the CO denied the Employer's request for reconsideration. Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review.

Discussion

Under 20 C.F.R. §656.21(b)(2)(i), the Employer is required to document that the requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the United States.

In the Notice of Findings, the CO stated, in pertinent part:

> You are requiring 2 years of college with a major field of study in accounting/general studies. There is no indication that these 2 years of college would provide an individual with the knowledge, skills and abilities to perform the job duties and responsibilities associated with this position. Also, based on the latest edition of the Revised Handbook for Analyzing Jobs, the course work covered in the first two years of the average four-year college curriculum cannot be counted in arriving at the SVP to be assigned an employer's job offer.

(AF 33).

The Employer's rebuttal regarding this issue was as follows:

> In order to comply with your findings, we would like to amend Form ETA-750, Part A, Item 14, Education to "1 year in accounting/business study." We believe that this amendment would satisfy your requirement as it is related to the position and not unduly restrictive. As such, we would also like (to) request the opportunity to re-advertise the position pending your approval of the amendment.

(AF 19). In addition, the Employer did, in fact, amend the ETA-750 to reflect the above changes (AF 46).

In the Final Determination, the CO summarily rejected the Employer's offer to reduce the education requirement, amend the field of major, and readvertise, stating:

> In reviewing your rebuttal evidence for Item A, you have not shown that by reducing the requirement for 2 years of college to 1 year of college that what is studied in the first year would provide an individual with the knowledge, skills and abilities to perform the job duties and responsibilities associated with this position. Additionally, the Notice advised you that the course work covered in the first two years of the average four-year college curriculum cannot be counted in arriving at the SVP to be assigned to an employer's job offer. Therefore, this item A remains in violation of the regulations.

(AF 17).

As outlined above, the CO challenged virtually every stated requirement and, subsequently acknowledged, that Employer's rebuttal cured each of the deficiencies except for the two-year college education requirement. Furthermore, the Employer offered to reduce, amend, and readvertise the college education requirement. Under such circumstances, we find that the CO should not have summarily issued the Final Determination. Instead, the CO should have issued a Supplemental Notice of Findings, in order to provide the Employer with an opportunity to either document the business necessity for its offered amendments, or, alternatively, delete the amended, one year college education requirement.

In conclusion, we find that the Employer was not given an opportunity to document the business necessity for its offered amendments, or, alternatively, delete the amended, one year college education requirement. Furthermore, the Employer was not accorded the opportunity to readvertise with the reduced or deleted education requirement. Therefore, even though it may be difficult to find a qualified U.S. applicant who meets the various special requirements which have been deemed acceptable by the CO (i.e., even without any education requirement), we are unable, based on the record, to determine whether there are U.S. workers who are ready, willing, and qualified to fill the position.

ORDER

Accordingly, the denial of certification is **VACATED**, and this case is **REMANDED** to the Certifying Officer for further proceedings consistent with this Decision.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.